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805508—48——1

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 232

ALLEN T. SIMMONS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the Federal Communications Commission (R. 121–146) are not yet reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 162–165) is not yet reported.

JURISDICTION

The United States Court of Appeals on May 24, 1948, affirmed the decision of the Federal Communications Commission. The petition for a writ

of certiorari was filed on August 18, 1948. Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 23, 1925 (now 28 U. S. C. 1254), and Section 402 (e) of the Communications Act of 1934.

QUESTION PRESENTED

Whether the Federal Communications Commission may deny a radio broadcasting license to an applicant who, by his program plans, proposes to surrender voluntarily to a national network organization the control over his day-to-day program selection which, as was established by this Court's decision in *National Broadcasting Company* v. *United States,* 319 U. S. 190, he may not surrender contractually.

STATUTE AND REGULATIONS INVOLVED

Certain sections of the Communications Act of 1934 (48 Stat. 1064) have been set out in the Petition and Appendix attached thereto. Sections 307 (a) and 309 (a) of the Act, and also Sections 3.104 and 3.105 of the Commission's Rules and Regulations (47 C. F. R. Cum. Supp. 1943, §§ 3.104, 3.105) are reprinted in the Appendix, *infra,* pp. 18–20.

STATEMENT

Petitioner Simmons is licensee of radio broadcasting station WADC at Akron, Ohio. He applied to the Commission for a change of frequency and increase of power. After a hearing his application was denied and the mutually exclusive

application of the WGAR Broadcasting Company was granted. Simmons' petition for rehearing was denied by the Commission. He appealed to the United States Court of Appeals for the District of Columbia, which on May 24, 1948, affirmed the Commission's denial of his application.

In 1942, petitioner Simmons and the WGAR Broadcasting Company, licensee of Station WGAR in Cleveland, had on file conflicting applications to operate on the frequency 1220 kilocycles with increased power. Both WGAR and WADC had been in operation for many years on other frequencies. On November 3, 1943, after a comparative hearing, the WGAR application was granted and Simmons' application denied (R. 121). Simmons then appealed to the United States Court of Appeals for the District of Columbia which upheld the denial of a license to Simmons. *Simmons* v. *Federal Communications Commission,* 79 App. D. C. 264, 145 F. 2d 578, decided November 13, 1944. This 1944 decision is not in issue in the present case.

The 1943 grant by the Commission to WGAR, on the frequency 1220 kc. with power of 5 kilowatts, was conditioned upon WGAR's filing an application, as soon as war-critical materials should become available, to improve its facilities so as to afford more satisfactory coverage to the city of Cleveland (R. 121). Thereafter, on August 23, 1945, WGAR filed an application to increase its

power from 5 kw. to 50 kw. (R. 122). On October 8, 1945, Simmons filed an application (R. 7) to operate on 1220 kc. with 50 kw. and proposed that should his application be granted WGAR be assigned the frequency of 1350 kc. with 5 kw. power previously used by Simmons. Because of the geographical proximity of the two stations, both could not operate on the same frequency without intolerable interference. Since the grant of one application precluded the grant of the other, the Commission on February 1, 1946, designated both applications for a consolidated hearing. (R. 11, 13.)

A consolidated hearing on the two applications was held before a Commission examiner on April 24, 25, and 26, 1946 (R. 121). On October 8, 1946, the Commission handed down a Proposed Decision proposing to grant the application of WGAR and to deny that of Simmons (R. 82–102). Exceptions to this proposed decision were filed by Simmons (R. 102–107), oral argument was held before the Commission, and on April 27, 1947, the Commission released its final decision (R. 121), denying the application of Simmons and granting that of WGAR (R. 145). Simmons filed an application for rehearing (R. 146) which was denied by a Memorandum Opinion and Order of the Commission of July 1, 1947 (R. 155).

The Commission in its decision concluded that Simmons' proposed program policy was such that, independently of the existence of the WGAR application, the public interest and convenience

would not be served by granting Simmons' application. At the same time, from an examination of the entire record in the case, the Commission concluded that a grant of WGAR's application would serve the public interest, convenience, and necessity, and accordingly granted it. The Commission based its denial of Simmons' application on a finding that, if the application were granted, WADC would broadcast without exception all programs, sustaining and commercial, of the Columbia Broadcasting System during the entire period of their availability from 8:00 AM to 11:00 PM. This finding was based on the testimony of petitioner's witnesses, and its accuracy is undisputed. Petitioner's director of promotion and publicity testified (R. 57–58): "We will carry a complete Columbia sustaining and commercial schedule." He was asked, "It will not be changed?" and answered, "That is correct." He also testified that he did not contemplate making any substitution for any Columbia program even when a specific program proved to be unpopular among its listeners. Petitioner's assistant manager testified, "We will cut no Columbia regardless of whether it is sustaining or commercial." (R. 42.)

The Commission said in its conclusions (R. 138):

> The application of WADC thus raises squarely the issue of whether the public interest, convenience and necessity would be served by a station which during by far

the largest and most important part of the broadcast day, "plugs" into the network line and, thereafter, acts as a mere relay station of program material piped in from outside the community. We are of the opinion that such a program policy which makes no effort whatsoever to tailor the programs offered by the national network organization to the particular needs of the community served by the radio station does not meet the public service responsibilities of a radio broadcast licensee. * * * applicant's proposed program policy is not only tantamount to a voluntary abdication to the network of the duty and responsibility of a broadcast station licensee to determine for itself the nature and character of a program service which will best meet the needs of listeners in its area, but is an abdication to an organization which makes no pretense to scheduling its programs with the particular needs and desires of any one service area in mind. A national network affiliation can be of great assistance to a particular station's service to its listeners as the source of a quantity of high calibre programs of general interest not otherwise available locally, to supplement, rather that to supersede, the locally originated programs of the station. It is not equipped, however, to take over the entire programming of any station; even the stations which are wholly owned by the national networks maintain extensive local program staffs which integrate the network's service

> into a daily program best calculated to serve local interests. And the same considerations of public policy which led us, in our Chain Broadcast Regulations, upheld by the Supreme Court in *National Broadcasting Company* v. *United States,* 319 U. S. 190, to make it impossible for a network to restrict the opportunity of one of its affiliates to substitute programs of local interest and derivation whenever the station determined that such programs would best serve the interests of its particular audience, lead us to conclude, here, that the voluntary adoption of a similar policy by a licensee cannot serve the public interest. In either case the local interests of the listening community are needlessly sacrificed. * * *

An appeal was taken on July 21, 1947, to the United States Court of Appeals for the District of Columbia. That court on May 24, 1948, in a decision by Justice Edgerton, with Justice Miller concurring in a separate opinion, affirmed the action of the Commission. The court quoted at length, with approval, from the Commission's conclusions, and held that "the cases the Commission cites fully supports its action. The policy to which appellant objects is the policy the Supreme Court upheld in the cited *National Boardcasting Company* case." (R. 164.) In disposing of the argument that the Commission's decision constituted an illegal act of censorship, upon which Simmons relied almost entirely, the court below said (R. 164):

> Appellant contends that the Commission's policy amounts to censorship, which the Communications Act forbids. 47 U. S. C. § 326, 48 Stat. 1091. Even if the *National Broadcasting Company* case had not foreclosed any such contention, censorship would be a curious term to apply to the requirement that licensees select their own programs by applying their own judgment to the conditions that arise from time to time.

The court also held that since Simmons' application was properly denied because of the Commission's determination that a grant would, independent of any question of comparative consideration of the mutually exclusive application of WGAR, not be in the public interest, Simmons was not aggrieved or adversely affected by the granting of the WGAR application, and therefore had no standing to attack it, citing *Simmons* v. *Federal Communications Commission,* 79 App. D. C. 264, 145 F. 2d 578.

ARGUMENT

I

The principal burden of appellant's argument, both in the court below and on this petition, is that the action of the Commission in denying appellant's application because the Commission determined that its proposed program service policies would not serve the public interest, convenience and necessity, constitutes an act of censor-

ship in violation of Section 326 of the Communications Act of 1934, as amended, 47 U. S. C. 326, as well as an abridgment of free speech contrary to the First Amendment to the United States Constitution. But an examination of the actual decision of the Commission makes clear that the decision of the Commission, far from being censorship or an abridgement of free speech, is, in essence, merely an application of the policy which was also embodied in the Chain Broadcasting regulations of the Commission which were upheld by this Court in the case of *National Broadcasting Company* v. *Federal Communications Commission,* 319 U. S. 190, against similar charges of censorship and abridgement of free speech.

What the Commission held to be contrary to the public interest in this case, is clearly governed by the policy underlying Sections 3.104 and 3.105 of the Commission's Chain Broadcasting Rules, upheld by this Court in the Networks case, *supra* (319 U. S. 190). Section 3.104 forbids a licensee to option all of its time for network programs, and provides that with respect to the time which may be optioned, the time may not be subject to call on less than 56 days' notice; also, the option for such time may not be exclusive as against other network organizations. Section 3.105 prohibits any contractual provision in a network affiliation agreement which would in any way limit the right of a station licensee to object any network program it believes to be not in the public interest or to

substitute for any regularly scheduled network program a local program of its own which the licensee believes will better serve the public interest. In its Report on Chain Broadcasting (Commission Order No. 37, Docket 5060) issued May 1941, the Commission at p. 66 explained its reasons for promulgating these particular regulations in the following passage which was in most part quoted with approval by this Court in *National Broadcasting Company* v. *United States,* 319 U. S. 190, 205–206:

> It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest.
>
> We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.

> Even after a licensee has accepted a network commercial program series, we believe he must reserve the right to substitute programs of outstanding national or local importance.

Here petitioner proposes to do unilaterally and without consultation with the network, what he could not lawfully do by contract or arrangement with it. The obvious results of petitioner's adherence to its own policy are that his station becomes wholly unavailable for the carrying of local programs or the programs of other networks during all the hours of the day, from 8:00 a. m. onward (R. 42) when Columbia Broadcasting System is making its programs available. Petitioner himself admits, with respect to his voluntarily assumed policy, that "Were such a contract to exist, it would come within the condemnation of the Commission's regulations approved by this Court in *National Broadcasting Company v. United States, supra.*" (Pet., p. 12.) But once this admission is made, petitioner's entire argument falls. For operation which is contrary to the public interest is no less so because the licensee determines to engage in such an operation on his own volition rather than in accordance with a contract requiring him to operate in such a manner. And it is obviously no more censorship or an abridgment of free speech to prohibit licensees from voluntarily delegating the entire responsibility for the daily operation of

their station to parties other than the licensee and not under their immediate control or supervision, than to prohibit licensees from entering into contracts or agreements to do the same thing.

What petitioner fails to realize is that the Chain Broadcasting Rules, Sections 3.104 and 3.105 in particular, are necessarily based on the conclusion that the particular practices to which the licensee commits himself, rather than the mere fact that the licensee has made a contract with a network organization, result in operation contrary to the public interest. Clearly, the Commission cannot lawfully prohibit all contractual arrangements between licensees and network organizations; the licensee's contractual arrangements with a network organization or any other person or group can be lawfully prohibited by the Commission only insofar as the result of a specific contractual provision is to prevent or hinder operation by the station licensee in the public interest. Thus the basis for the Commission's proscription of the practices outlawed by Sections 3.104 and 3.105 rests in the adverse effect such practices have upon the licensee's ability to tailor its broadcast service to the particular needs of the community which it serves. As this Court has pointed out in *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 475, "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best prac-

ticable service to the community reached by his broadcasts." See also *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 138, footnote 2. The Act contemplates that such local and regional needs will be provided for through the day-to-day and program-to-program determination by the licensee or persons directly under his supervision and control, as to what available programs, without regard to source, will best serve the interests of the station's listeners. And where the licensee, either by contractual arrangement or of his own volition, ceases to assume this responsibility, it necessarily ceases to operate in the public interest.

It is not sufficient to argue, as petitioner argues here and in the court below, that the policy determination of Simmons to broadcast any and all programs offered to him by the Columbia Broadcasting System is, in itself, the requisite exercise of the licensee's duty to determine the programs to be broadcast over its station. Even if the licensee knew in advance specific programs which were to be broadcast by the Columbia Broadcasting System during the three year license period, the licensee would nevertheless be abrogating its responsibility to serve the public interest by deciding, at the beginning of the license period, that it would broadcast all of these programs, without exception, and without consideration as to whether the particular needs or interests of its listening audience at any given time during the license pe-

riod might require the carrying of some other program of special local or regional interest. But in this case, as the record makes clear (R. 59), petitioner does not know the specific programs to be broadcast by the Columbia Broadcasting System. And it is not sufficient to say that because this is a "voluntary policy" of the licensee and he will therefore not be contractually bound to continue with the policy, that the Commission must consequently come to a determination that the licensee will exercise its statutory responsibility in the programming of its station. In passing upon applications for broadcast licenses, the Commission is necessarily obliged to rely on what the applicant says it will do and cannot legally base any determination upon the fact that the licensee at some indefinite time in the future might determine to abandon the policy upon which he predicates his application. Petitioner has not stated in this case that he thinks he will broadcast *most* of the Columbia Broadcasting System programs or that he thinks he will not *generally* substitute local programs. On the contrary, he has unequivocally stated that he will broadcast all Columbia Broadcasting System programs and that "We could think of no instances in which we would be interested in carrying a Cleveland program or an Akron program, or a Canton program." (R. 40, 43.)

Petitioner's contention that the action of the Commission constitutes censorship in violation of

Section 326 of the Communications Act as well as an abridgment of freedom of speech in violation of the First Amendment of the United States Constitution is clearly without merit. While it is of course true that radio is among the means of expression which are protected from abridgment by the government by the First Amendment of the Constitution (*United States* v. *Paramount Pictures,* 334 U. S. 131, 166), nothing in the Commission's decision can remotely be said to constitute censorship of any radio program material in contravention of Section 326 of the Communications Act or to abridge petitioner's freedom of speech. As the court below aptly stated, "censorship would be a curious term to apply to the requirement that licensees select their own programs by applying their own judgment to the conditions that arise from time to time". There is clearly no previous restraint of any kind stated or implied in the Commission's decision, nor does the ruling of the Commission require petitioner or any other licensee to broadcast or refrain from broadcasting any of the programs or types of programs which might be offered to it by the Columbia Broadcasting System or any other programs, whatever their source.

It is obvious that these claims of censorship and abridgment of freedom of speech are identical in nature with the similar allegations which have been already considered and specifically rejected by this Court in its decision in *National Broadcasting Company* v. *United States, supra.* In that case this Court held (319 U. S. 190, 226–227):

The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

II

Petitioner alleges that the Commission did not give "comparative consideration" to his application and that of WGAR, and that he has thus been deprived of the fair hearing required by *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327. But it is clear enough that the *Ashbacker* case is not applicable to the facts presented in this case. Petitioner's application was heard with the mutually exclusive application of WGAR, and the applications were disposed of on the basis of the record made in that hearing. The *Ashbacker* case deals with the timing and nature of the hearing necessary for affording competing applicants a full and fair hearing. It does not deal with the question of what findings and what grounds of decision are a sufficient basis for denial of an application after such a hearing is afforded.

When, as in the present case, the record of the consolidated hearing supports a finding that the contemplated operation of one of the applicants would not be in the public interest, so that his application could not be granted even in the

absence of a competing application, it becomes impossible in any meaningful sense to base a decision on "comparison" between the two applicants. "No formal or direct comparison is necessary between an application which must be denied and one which may be granted. Relative consideration is meaningless unless there are two applications either of which, considered alone, might be granted." *Simmons* v. *Federal Communications Commissions,* 79 App. D. C. 264, 265; 145 F. 2d 578, 579. Thus, since petitioner's application must be denied regardless of the existence of a competing application, he is not entitled to comparative consideration of his application on the other elements of public interest, convenience and necessity.

CONCLUSION

The decision below is correct and no novel question of importance is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1948.

APPENDIX

COMMUNICATIONS ACT OF 1934

SEC. 307 (a): The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

SEC. 309 (a): If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

FEDERAL COMMUNICATIONS COMMISSION RULES AND REGULATIONS

SEC. 3.104: OPTION TIME.—No license shall be granted to a standard broadcast station which options [1] for network programs any time subject

[1] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station

to call on less than 56 days' notice, or more time than a total of three hours[2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

SEC. 3.105: RIGHT TO REJECT PROGRAMS.—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any

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and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

U. S. GOVERNMENT PRINTING OFFICE: 1949